

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FRANKLIN DUNCAN, individually,
and CYNTHIA DUNCAN,
individually, both as marital
community,

Plaintiffs,

v.

VICTOR JAY GRANT, individually
and d/b/a RCB INVESTIGATIONS;
CITY OF LIBERTY LAKE, a
municipal government; CLINT
GIBSON, individually,

Defendants.

NO: 12-CV-0219-TOR

ORDER GRANTING STIPULATED
DISMISSAL OF PLAINTIFFS' 42
U.S.C. § 1983 CLAIMS AND
DENYING PLAINTIFFS' MOTION
FOR REMAND

BEFORE THE COURT is Plaintiffs' Expedited Motion for Remand for
Lack of Subject Matter Jurisdiction (ECF No. 64). Also before the Court are the
parties' Stipulated Motions for Fed R. Civ. P. 41(a)(2) Dismissal of 42 U.S.C. §
1983 Claims (ECF Nos. 63, 93) and accompanying Motion on Shortened Time for
Hearing Stipulated Fed. R. Civ. P. 41 Dismissal of 42 U.S.C. § 1983 Claim (ECF

ORDER GRANTING STIPULATED DISMISSAL OF PLAINTIFFS' 42 U.S.C. §
1983 CLAIMS AND DENYING PLAINTIFFS' MOTION FOR REMAND ~ 1

1 No. 62). This matter was heard with oral argument on May 28, 2013. Marcia
2 Marie Meade appeared on behalf of the Plaintiff. Michael E. McFarland, Jr.
3 appeared on behalf of Defendants City of Liberty Lake and Clint Gibson. John
4 Charles Riseborough appeared on behalf of Defendant Victor Jay Grant. The
5 Court has reviewed the briefing and the record and files herein, and is fully
6 informed.

7 BACKGROUND

8 On February 27, 2012, Plaintiffs filed a Complaint in Spokane County
9 Superior Court alleging excessive force and wrongful arrest under 42 U.S.C. §
10 1983; and state law claims of negligence, assault, battery, false imprisonment, false
11 arrest, malicious prosecution, the tort of outrage, negligent infliction of emotional
12 distress, and intentional infliction of emotional distress. ECF No. 2. On April 25,
13 2012 Defendants removed the case to this Court pursuant to 28 U.S.C. § 1441(a).
14 ECF No. 1. In support of removal, Defendants properly represented that this Court
15 had original jurisdiction over Plaintiff's federal § 1983 claims pursuant to 28
16 U.S.C. § 1331.

17 A Scheduling Order was issued by the Court on July 17, 2012. ECF No. 24.
18 On December 10, 2012, Plaintiffs withdrew his claims of damages for wage loss
19 and earning capacity. ECF No. 29. On March 26, 2013, Defendants filed a
20 motion to compel Rule 35 examinations, which the Court denied as moot on April

26, 2013 due to Plaintiffs' agreement to undergo said examinations. ECF No. 36, 51. On April 18, 2013, Defendants filed a motion to exclude Plaintiffs' identification of expert witnesses. ECF No. 45. Plaintiff did not respond to this motion, nor did they identify expert witnesses. On May 6, 2013, Plaintiffs filed their first notice of "Plaintiffs' Withdrawal of 42 U.S.C. § 1983 Claims and Request to Remand to State Court." ECF No. 53. On May 8, 2013, the Court granted Defendants' motion to preclude expert witnesses as they were not timely disclosed under the terms of the Scheduling Order. ECF No. 59. On the same day, Defendants filed a declaration indicating they agreed to dismissal of the 42 U.S.C. § 1983 claims, but did not agree to remand of the remaining state law claims. ECF No. 58 at ¶ 6. Presently before the Court is a stipulated motion to dismiss the 42 U.S.C. § 1983 claims, and Plaintiffs' motion to remand the remaining state law causes of action.¹

DISCUSSION

A. Stipulation to Dismissal of Plaintiff's 42 U.S.C. § 1983 Claims

Pursuant to the parties' stipulation, the Court will dismiss Plaintiffs' federal

¹ In the interim between the filing of Plaintiffs' motions presently before the Court and the hearing on this matter, the Court granted in part Defendants' renewed motion to compel a Rule 35 examination after Plaintiff's failure to appear at the agreed upon examination as scheduled. ECF No. 70, 84.

1 causes of action **with prejudice** and without cost to any party. *See* Fed. R. Civ. P.
2 41(a)(1)(A)(ii); ECF Nos. 58, 60, 61, 63, 93. Having dismissed all federal claims,
3 the Court turns to whether it will exercise its discretion to retain supplemental
4 jurisdiction over Plaintiffs' remaining state law claims.

5 **B. Remand**

6 Federal jurisdiction depends upon the circumstances that exist at the time of
7 removal without regard to subsequent amendments. *Sparta Surgical Corp. v. Nat'l*
8 *Ass'n of Secs. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998). "Once a federal
9 court acquires removal jurisdiction over a case, it also acquires jurisdiction over
10 pendent state law claims. Dismissal of federal claims does not deprive a federal
11 court of the power to adjudicate the remaining state law claims." *Nishimoto v.*
12 *Federman-Bachrach & Associates*, 903 F.2d 709, 715 (9th Cir. 1990)(internal
13 citations omitted). Rather, when a case is properly removed pursuant to federal
14 question jurisdiction, and the federal claims are subsequently dismissed from the
15 lawsuit, the district court's decision to retain supplemental jurisdiction over the
16 pendent state law claims is discretionary. *See* 28 U.S.C. § 1367(c); *Albingia*
17 *Versicherungs A.G. v. Schenker Intern. Inc.*, 344 F.3d 931, 936-38 (9th Cir. 2003),
18 *amended on other grounds* at 350 F.3d 916 (9th Cir. 2003)("Supplemental
19 jurisdiction is not destroyed by elimination of the basis for original jurisdiction.").

20 When deciding whether to exercise supplemental jurisdiction over pendent

1 state law claims, a district court “should consider and weigh in each case, and at
2 every stage of the litigation, the values of judicial economy, convenience, fairness,
3 and comity....” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). As
4 stated by the Supreme Court and echoed by the Ninth Circuit, “in the usual case in
5 which all federal-law claims are eliminated before trial, the balance of factors ...
6 will point toward declining to exercise jurisdiction over the remaining state-law
7 claims.” *Id.* at 350 n.7. However, the interests of judicial economy, convenience,
8 fairness, and comity may sometimes best be served by retention of jurisdiction in
9 federal court, such as instances “where the trial date is imminent or the federal
10 court has performed a substantial amount of legal analysis that would need to be
11 repeated by a state court if the case were remanded.” *Miller v. Bay Area Rapid*
12 *Transit Dist.*, 236 F. Supp. 2d 1110, 1116 (N.D. Cal. 2002). The court may also
13 consider whether the plaintiff engaged in any “manipulative tactics” in deciding
14 whether to remand a case. *See Baddie v. Berkeley Farms*, 64 F.3d 487, 490-91
15 (9th Cir. 1995)(differentiating between manipulation and a “straight-forward
16 tactical decision”)

17 As an initial matter, the Court is compelled to note that Plaintiffs fail to
18 identify the proper legal basis for a remand in these particular circumstances. First,
19 Plaintiffs argue that the Court must remand the case as a matter of law because the
20 dismissal of the federal claims automatically deprives it of subject matter

jurisdiction. ECF No. 64 at 1-2. This misstates the applicable legal rule. Plaintiff does not dispute that removal based on federal question jurisdiction was proper at the time it was accomplished.² See ECF No. 1. Thus, “[o]nce supplemental jurisdiction exists, it remains, subject to the discretionary provision for remand....” *Albingia*, 344 F.3d at 938. Next, Plaintiffs cite to several Supreme Court cases ostensibly to support their argument that the Court no longer has subject matter jurisdiction over the state law claims after the federal claims are dismissed. See *Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005); *Gunn v. Minton*, 133 S.Ct. 1059 (2013). However, in both *Grable* and *Gunn*, the Court was considering whether “original jurisdiction” existed over state law claims that implicate federal issues, not whether a court properly exercised its discretion to retain supplemental jurisdiction over state law claims. See *Grable*, 545 U.S. at 312-13; *Gunn*, 133 S.Ct. at 1064-65. Thus, any reliance on these cases to support remand in this case is inapposite.

Despite their failure to identify the proper legal basis for remanding this case, Plaintiffs do make several arguments as to why “economy, fairness and

² Plaintiff emphasizes that there is no diversity among the parties. ECF No. 64 at 2; ECF No. 82 at 3. However, Defendants removed the action based solely on federal question jurisdiction, not diversity jurisdiction. ECF No. 1; see also 28 U.S.C. § 1441(a). Therefore, this argument is inapposite.

1 convenience equally support's [sic] remand to state court." ³ ECF No. 82 at 5.

2 First, Plaintiffs argue that the case has proceeded "with little involvement of the
3 Court but for the original Case Scheduling Order." Plaintiffs also somewhat
4 contradictorily maintain that considerable discovery remains uncompleted in this
5 case due to unavailability of Defendants' witnesses, while also conceding that [a]ll
6 parties have endeavored to make matters work within the scheduling parameters of
7 all persons." ECF No. 82 at 5-6, n.1. According to Plaintiffs, the discovery that
8 has and will be conducted would be applicable in the state court action and
9 therefore "the cost is the same for the Defendants." ECF No. 82 at 7. Moreover,
10 Plaintiffs argue that the proceedings would not necessarily be delayed if the matter
11 is remanded to state court. ECF No. 82 at 9. Last, Plaintiffs make a plea to the
12 Court to remand the state law claims for the sake of Mr. Duncan's emotional well-

13
14 ³ Plaintiffs also take a considerable amount of time to recount the "facts" of the
15 case as they see them, seemingly in support of the instant motion. *See* Duncan
16 Decl., ECF No. 77; Andres Decl., ECF No. 79. The Court notes that Plaintiffs'
17 version of events are heavily disputed by Defendants (ECF No. 85 at 3-5), and
18 Plaintiffs offer no legal authority to support how their recitation of the alleged
19 events surrounding their claims is relevant to the Court's determination of whether
20 to remand the state law claims.

1 being and peace of mind.⁴ ECF No. 82 at 7-9; Duncan Decl., ECF No. 77 at 5-10.

2 Defendants respond that judicial economy, fairness and convenience weigh
3 in favor of the Court continuing to exercise supplemental jurisdiction over the state
4 law claims. The Court agrees. This case has been pending for over a year and a
5 large amount of discovery has already been completed in anticipation of the July 1,
6 2013 discovery cut-off deadline. Trial is scheduled to commence on November 4,
7 2013, and despite Plaintiffs' insistence that there *may* not be unreasonable delays
8 in state court, the Court finds Defendants would unfairly suffer extended delays if
9 this case is remanded to state court. They have already waited over a year to try
10 this case, after diligently pursuing discovery, and would likely wait another year if
11 they start over in state court. Furthermore, while the Court has not expended a
12 great deal of resources up to this point, it has ruled on motion practice and
13 discovery issues, and developed a familiarity with the facts of this case. The Court
14 finds nothing unique or complex about the pendent state law claims in this case
15 that would weigh in favor of remand. The federal and state claims have similar
16 burdens of proof; and the state claims arise out of the exact same facts as the

17 ⁴ Mr. Duncan expands upon this reasoning with background including: his bad
18 experiences with the Social Security Administration, lack of financial resources,
19 and belief that he will have more "control" over the action in state court. ECF No.
20 77 at 5-10.

1 federal causes of action.

2 Plaintiffs waited over a year after this case was properly removed to dismiss
3 their federal claims and seek remand to state court. The instant motions were filed
4 only days before the Court granted Defendants' unopposed motion to preclude
5 Plaintiffs from identifying expert witnesses. This timing raises the suspicion of an
6 improper attempt by Plaintiffs to manipulate the forum. *Carnegie*, 484 U.S. at
7 357 ("[i]f the plaintiff has attempted to manipulate the forum, the court should take
8 this behavior into account in determining whether the balance of factors to be
9 considered under the pendent jurisdiction doctrine support a remand in the case.").
10 Plaintiffs deny any manipulation and contend they withdrew their claims before the
11 Court officially ruled on the motion to preclude expert witnesses, and the
12 withdrawal of the federal claims is "consistent [with his] pattern of reasoning when
13 viewed in light of his withdrawal of his earning capacity loss claims." ECF No. 82
14 at 11. While the Court declines to find explicit manipulation by Plaintiffs, it finds
15 the timing of the instant motions weighs against remand in the interest of fairness
16 and judicial economy for all parties.

17 As a final note, while the Court is not unsympathetic to Mr. Duncan's plea
18 for remand based on concerns for his safety and mental well-being in federal court,
19 Plaintiffs offer no authority under which a Court has chosen to remand a case on
20 these grounds. Nor is it appropriate for the Court to consider testimony from

1 Plaintiff and other witnesses as to their version of the events surrounding this cause
2 of action. (ECF Nos. 77, 79). For all of these reasons, this is not the “usual” case
3 identified by the Supreme Court in which the balance of factors points toward
4 declining to exercise jurisdiction over pendent state law claims. *Carnegie*, 484
5 U.S. at 350, n.7. Under the present circumstances, the Court finds the issues of
6 judicial economy, convenience, fairness and comity weigh against remand and in
7 favor of the Court retaining supplemental jurisdiction over the state law claims.

8 **ACCORDINGLY, IT IS HEREBY ORDERED:**

9 1. Plaintiffs’ Expedited Motion for Remand for Lack of Subject Matter

10 Jurisdiction (ECF No. 64) is **DENIED**.

11 2. Stipulated Motion for Fed R. Civ. P. 41(a)(2) Dismissal of 42 U.S.C. §

12 1983 Claims (ECF Nos. 61, 63 and 93) are **GRANTED**. Plaintiffs’

13 federal claims against all Defendants are **DISMISSED with prejudice**
14 and without costs to any party.

15 3. Plaintiffs’ Motion on Shortened Time for Hearing Stipulated Fed. R. Civ.

16 P. 41 Dismissal of 42 U.S.C. § 1983 Claim (ECF No. 62) is **GRANTED**.

17 The District Court Executive is hereby directed to enter this Order and
18 provide copies to counsel. **DATED** May 28, 2013.



A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge